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Asia and Global Competition Law Convergence

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ASIAN CAPITALISM AND THE REGULATION OF COMPETITION

Towards a Regulatory Geography of
Global Competition Law

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Asia and global competition law convergence

DAVID J. GERBER

I. Introduction

Two topics have featured in discussions of transnational competition law over the last few years – the evolution of competition law in Asia and the global convergence of competition laws. The role of Asia, especially China, in global competition law development has attracted attention primarily because of the dramatically increased economic importance of the region and because of the resulting political and economic leverage that this economic importance has generated for the enforcement of the region's competition laws. Convergence is a central topic because it represents what is widely considered to be the only currently viable strategy for global competition law development. Curiously, however, the relationship between these two topics is seldom a focus of examination. This chapter sketches elements of that relationship. It introduces themes that are further developed in the chapters that follow.

Asia will necessarily play a central role in the evolution of competition law on the global level. Its economic and political importance will condition the potential effectiveness of any strategy for improving the legal framework of global markets.¹ Without widespread support from Asian countries, no such strategy can be successful. In particular, a strategy based on convergence of competition law systems can only be successful if it achieves such support. A central theme of this essay is, however, that the dynamics of competition law in Asia may limit the extent to which decision-makers there seek to move their competition law systems towards the 'Western' model that is envisioned in the current convergence strategy.

¹ I have dealt in depth with issues of global competition law in David J. Gerber, *Global Competition: Law, Markets and Globalization* (Oxford University Press, 2010). The book also contains extensive references to related literature. I refer the interested reader to that volume for further references.

My objective here is to identify some of the factors in the dynamics of Asian competition law systems that may influence Asia's role in convergence as a global strategy and thereby impact both the success of such a strategy and its shape. We focus here on decisions and on decisional influences – that is, factors that can be expected to influence decisions by relevant decision-makers.² Current Asian competition law regimes and experience with them represent one set of influences (see, e.g., Part III of this volume). Broader legal, political, and social factors produce another (see Part IV of this volume; see also Gillespie, Ch. 8). Our analysis focuses on competition law, but much of it also relates to larger issues concerning the role of Asia in legal globalization and in the evolution of 'varieties of capitalism'.³

II. Scope and key terms

Several key terms call for clarification of the ways in which we are using them here. One is the term 'Asia' itself. Geographically, it refers to a vast area whose borders are reasonably clear. Yet competition law experience in this region has been limited primarily to East Asia (basically, China, Japan, South Korea, and Taiwan).⁴ Areas such as Southeast Asia have only recently begun to take competition law seriously.⁵ As described in the first chapter by Dowdle, this volume includes both East and Southeast Asia within its use of the term. This chapter focuses primarily on the East Asian experience, tying it into larger Asian themes where appropriate.

'Competition law' here refers to a normative framework – institutions and processes – whose stated objective is to deter restraints on competition. The primary objective of this form of law is to provide a public good – namely markets that are more valuable to society because their operation is not distorted or restrained by private

² For fuller discussion of this methodology, see David J. Gerber, 'System Dynamics: Toward a Language of Comparative Law', *American Journal of Comparative Law*, 46 (1998), 719–37.

³ Peter A. Hall and David Soskice (eds.), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001).

⁴ For an overview of the East Asian experience see Gerber, *Global Competition*, pp. 202–36.

⁵ The countries of Southeast Asia often share basic issues with smaller, developing countries elsewhere. The leading analysis of competition law issues in small-market economies is Michal S. Gal, *Competition Policy for Small Market Economies* (Cambridge, MA: Harvard University Press, 2003).

conduct (see also Dowdle, Ch. 1, pp. 21–4). In the United States, the term used for this area of law is ‘antitrust law’. In some countries, however, the term ‘competition law’ includes what is usually referred to as ‘unfair competition law’ – that is, legal regimes designed to protect competitors from conduct that is considered in some sense ‘unfair’. Unfair competition law thus pursues aims that are fundamentally different from those of ‘competition law’ as described above, although their norms sometimes overlap.

Finally, the term ‘convergence’ is used here to refer to a process in which decision-makers decide *of their own accord* to move the characteristics of their competition law systems towards a common point, which we shall call a ‘convergence point’ (cf. Sum, Ch. 4).⁶ It is important to emphasize that we are here exclusively concerned with decisions that are voluntary – that is, that are not made pursuant to obligation (e.g., through treaty) and are not subject to compulsion (e.g., political or economic compulsion such as may be created by the need to receive a loan from an international lender).

III. Temporal contexts

The temporal context of Asian competition law experience influences not only the current operation of Asian competition law systems, but also their roles in the evolution of transnational competition law. It conditions the ways in which national and transnational decisions are interwoven. Asian competition law experience has a specific location in time that shapes the assumptions, judgements, and incentives of decision-makers, and that temporal location creates contexts for decision-making that differ in significant ways from experiences within the United States and Europe (see, e.g., Vande Walle’s discussion of the historical evolution of competition law in Japan, Ch. 6).

In general, competition law experience in Asia has been recent, limited, wary, and ambiguous. These factors are often closely related to each other. Competition law is relatively new to Asia.⁷ Very few countries had

⁶ For more thorough discussion of the concept of convergence see Gerber, *Global Competition*, pp. 281–93.

⁷ For overviews of early developments see Donald H. Brooks and Simon J. Evenett (eds.), *Competition Policy and Development in Asia* (New York: Palgrave Macmillan, 2005). For a more recent overview, see Toshiaki Takigawa and Mark Williams (eds.), *Antitrust Bulletin*, 54 (2009), *Symposium Part I: Asian Competition Laws*.

competition laws of any significance prior to the 1990s. One exception is Japan, but even there the actual implementation of competition law also remained weak during this period.⁸ The US occupation authorities imposed competition law on Japan in the wake of World War II, but, again as described by Simon Vande Walle in Chapter 6, competition law played a relatively small role there prior to the globalization wave of the 1990s. This relatively shallow experience with competition law frames and influences many, if not all, competition law decisions in Asian countries.

Asian competition law experience is not only recent, but also generally limited in scope and depth. Even today, most Asian countries have had only limited experience in actually enforcing competition laws. As a result, countries other than Japan, Taiwan, and South Korea seldom have competition officials with significant enforcement experience or practical expertise. Even in those few countries where there has been some competition law enforcement (primarily Singapore), it is far more limited than is the enforcement experience in 'Western' jurisdictions such as the United States, Germany, and the European Union (see also Prosser, Ch. 10).

This is related to the third signal element in Asian competition law experience mentioned above – namely, wariness. Decision-makers in Asian competition law systems have moved slowly and carefully in implementing their competition law regimes. The distance between 'law on the books' and 'law in action' often remains great. With often limited and uncertain political backing, legislators and officials have avoided going 'too far too fast'. In Japan, for example, officials were very wary of enforcing competition law until the 1990s, and in recent years the Chinese have been similarly cautious, especially in areas other than merger control (which is subject to extensive foreign pressures and obligations) (see also Zheng, Ch. 7, pp. 151–60).⁹

Finally, Asian experience with competition law is often ambiguous. On the one hand, many officials and politicians assert the value of competition and claim to believe that competition law can be of value in establishing and maintaining it. Many statutes also follow

⁸ Another notable exception is Taiwan, where competition law first acquired significant backing in the 1980s.

⁹ For discussion of some of the factors at play in the Chinese context, see David J. Gerber, 'Constructing Competition Law in China: The Potential Value of European and U.S. Experience', 3 *Washington University Global Studies Law Review* 3 (2004), 315–31.

European or US models to a significant degree, and competition law officials often appear to follow the practices of their European and American counterparts. On the other hand, however, these claims and actions often appear to have limited political support and remain largely ineffectual in practice. For example, many states in the region have accepted competition law under pressure from external sources – for example, as a condition of receiving a loan from an international lending agency such as the International Monetary Fund (IMF) or the World Bank, and they are subject to pressures from foreign sources actually to implement them. Where statutes and decisions are coerced, incentives to apply and enforce them may meet with significant domestic resistance (see, e.g., Gillespie, Ch. 8). Domestic political and economic interests may impede competition authorities from applying competition law provisions seriously, especially if it harms their perceived interests. Under these circumstances, officials must often walk a narrow path in which they send mixed and sometimes even contradictory signals about their intentions and policies, depending on whether the intended audience is primarily foreign or primarily domestic. The contrasting ‘pulls’ of the two audiences – domestic and international – create uncertainty on the part of both the decision-makers and the audiences that seek to interpret their actions.

This temporal context has additional implications for decision-making in Asian competition law systems. I mention only two. One is that Asian decision-makers are continually faced with foreign models and operate under pressure from foreign sources to conform to those models. This presents a sharp contrast to the contexts in which US and European competition law evolved. In the United States, antitrust law developed for almost a century with limited concern for the impact of the outside world on it; and in Europe competition law also evolved for decades with limited influence from outside sources.¹⁰ A second implication is that these countries are under pressure to play ‘catch-up’ – that is, to try to ‘modernize’ as quickly as possible, where ‘modernize’ means ‘Westernize’. One result is that they often have incentives simply to ‘put on a good show’ for foreign audiences in order to buy time for themselves to develop competition law according to their own needs or not to develop it at all.

¹⁰ For detailed analysis of European competition law development, see David J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford University Press, 1998).

IV. Economic contexts

The economic contexts in which competition law has evolved in Asia also have distinctive traits that bear on the convergence strategy. Levels of economic development in Asia often differ dramatically among Asian countries and even within individual countries (see, e.g., Dowdle, Ch. 9). This makes generalizations particularly difficult, but three patterns that are often found in Asian countries deserve particular mention.

A. State involvement

One pattern is the frequently high level of state involvement in the economy. In China, Vietnam, and some other countries this includes extensive state ownership of major enterprises, and this creates incentives for the government to avoid subjecting such companies to burdens that might impede their profitability.¹¹ Even where public bodies do not own a particularly large share of the country's productive capacity (e.g. Japan and South Korea), government officials often have significant capacity to influence and steer business decisions and thus to shape the direction of economic development.

B. Domestic industry structures

A second component of the economic context that is common in Asia involves structures within the domestic economy. The prominence of the so-called 'hub and spokes' pattern of industrial structure (also known as 'production chains' or 'production networks') is a central concern (see especially Yeung, Ch. 11; see also Dowdle, Ch. 9). It is particularly prominent in Japan and South Korea, where the structures and relationships are relatively well defined and even have specific names (*keiretsu* and *zaibatsu* in Japan, *chaebol* in South Korea). Less clearly defined versions of it are also found in China and Vietnam as well as in many other countries. In this pattern, large networks of companies are structured around one or more large central industrial units and a related bank. The smaller firms typically supply the core industry and maintain close relationships with it. In effect, they

¹¹ For discussion, see Dali L. Yang, *Reshaping the Chinese Leviathan* (Stanford University Press, 2004).

function as dependent subcontractors – that is, they agree to provide particular goods or services to the core industrial unit, and in return they receive long-term purchasing obligations, favourable financing arrangements and other benefits, either from the industrial core unit itself or from a bank or other financial institution that is part of the hub and spokes group.

In many Asian countries the predominance of this pattern makes the relationships between the core units and their dependents a central concern of economic policy in general and of competition policy in particular. There are reports that in meetings among Asian competition law officials, these dependency relationships are often a major topic of discussion. These relationships raise issues of the use of economic power and 'fairness' that are often specific to this type of economic structure (see e.g. Dowdle, Ch. 9).

C. *The international economic context*

The international economic context also helps to shape competition law decisions in Asia. I mention two particularly prominent issues. One is the extent to which many Asian countries depend on foreign direct investment (FDI) for their economic advancement and often their political stability. The exceptionally rapid economic development in China and many other countries has been fuelled by foreign investment from the United States, Europe, and Japan. The main attraction has been lower labour and other factor costs. Although there is general recognition that the fuel of foreign direct investment is likely to diminish, most countries remain heavily dependent on it for the foreseeable future. This generates incentives for economic policymakers to tailor their policies and, above all, their *statements about policy* to the needs and expectations of potential foreign investors.

The international economic context also generates a perceived need for 'national champions' that is particularly prominent in Asian policy discussions, particularly in East Asia. In much of Asia, globalization has helped to generate the belief that domestic Asian companies require special protection in order to be able to 'catch up' with Western firms. They cannot be expected to compete effectively against foreign firms at this stage of development, so they must be given special advantages that counterbalance the 'head start' of Western and Japanese firms. This view of the relationship between domestic firms and the global economy is often used to justify government measures to support firms that are thought to be eventually

capable of competing in global markets. The motivations for supporting and protecting 'national champions' include not only economic considerations, but also issues of international prestige and political influence.

These economic contexts create pressures on competition law decision-makers. Even the most independent competition law authorities are influenced by them. This does not necessarily, however, create pressures for greater conformity among competition law systems. It is often assumed that because all countries face similar international economic contexts, those contexts themselves will foster convergence among competition law systems. Yet this assumption deserves careful scrutiny. As explored by John Gillespie in Chapter 8, global economic pressures vary in the direction and intensity of their impact on particular states! The key issue is not the contexts themselves, but how decision-makers in individual countries perceive their relationship to these contexts. This may depend on numerous factors, such as, for example, the economic position of the state's economic units in relation to foreign markets and competitors and the state's international political obligations and interests. Moreover, these factors are always tempered with and shaped by domestic political and economic elites and their perceptions of these contexts.

V. Policy contexts

These temporal and economic contexts shape the issues to which decision-makers must respond, and competition law is increasingly seen as an important part of such policy responses. Competition law is, in turn, embedded in both domestic and political contexts that provide incentives, support, and constraints on competition law development. Historically, competition law has functioned well only when it has been part of a broader complex of policies that seeks to improve market functioning and enjoys political support for that mission. In Asia, however, the policy environments in which competition law is embedded often provide uncertain and fragile support. (This political aspect of Asian competition regulation is explored further by Tony Prosser in Ch. 10.)

A. *The domestic policy environment*

The domestic policy environment in Asian countries seldom provides strong support for competition law. As noted above, most institutional incentives and procedures in these systems have evolved within a context

in which government officials are expected to control or strongly influence economic activity and economic development. This long-standing pattern in relations between the state and the market tends to conflict with the aims of competition law, which, by definition, seek to foster the competitive process rather than the state as the primary regulator of economic activity. Moreover, these domestic policy arrangements, patterns, and institutional cultures are often well established, and the political elites inhabiting them are often very powerful. This contrasts with the situation of most competition authorities, which are generally new and which frequently lack both experience and political clout. Often, therefore, domestic policy environments constrain rather than foster competition law development.

B. International economic policy environments

The international policy environment can sometimes provide a more hospitable climate for the development and effectiveness of competition law. The institutions of government that deal with transnational issues such as trade and investment often have incentives to advocate and support competition law. They are exposed to foreign pressure and influence, and their incentives to please foreign constituencies can be significant. Moreover, supporters of freer trade and/or greater international economic co-operation tend to share with competition law at least a basic appreciation of the importance of competition. Finally, to the extent that decision-makers in these institutions are concerned with international status for themselves or for their institutions and governments, they have incentives to follow models that are supported by leading players on the international level. Nevertheless, institutions dealing with foreign economic policy generally have less weight in domestic decision-making than their counterparts on the domestic sides, and this may be particularly true in Asia. Domestic policymakers tend to be more directly connected to sources of political and economic support than are foreign policy officials.

The policy environments within which officials can seek to implement competition law in Asia thus may provide some support for a global convergence strategy, but it is often fragile and not necessarily dependable or resilient. Moreover, while there are incentives to follow Western models at the formal, message-sending level, there are often significant obstacles to actually implementing competition policy in a sustained and serious way.

VI. Defining the goals of competition law

Goals are the focal point of the convergence strategy. If all competition law systems move towards acceptance of the same set of goals, convergence at this level can be expected to lead towards convergence in outcomes and thereby generate an increasingly uniform normative framework for global competition. Statements of goals perform symbolic functions, and they are an important part of the convergence picture. Nevertheless, official statements about the goals of competition law often do not represent the objectives actually pursued by decision-makers.

In general, goals are taken more seriously where they correspond to a perceived societal need. Accordingly, the most effective way to set goals is to begin with the perceived problems and to develop legal tools specifically designed to solve them. In this procedure, the problems function as the starting point for fashioning competition law goals. Convergence as a strategy moves in the opposite direction. There the starting point is a solution that already exists rather than a harm which needs to be addressed. Moreover, it is a solution devised elsewhere by someone else. In current versions of global competition law convergence, the goals of competition law in the United States and Europe are used as the convergence point for others to emulate and approach. In short, instead of starting with the problems to be resolved, this strategy starts with a set of solutions and asks others to accept them (see also Sum, Ch. 4, pp. 88–92).

Decision-makers in many Asian countries may consider these solutions appropriate for their own contexts, and there may be valid reasons for urging their acceptance. For many Asian decision-makers, however, it is not clear that this set of responses is appropriate to the needs and problems of politics in the region (cf. Dowdle, Ch. 1, pp. 33–5). Where this is true, they are not likely to garner the political support necessary for effective implementation. For example, the predominance of 'hub and spokes' structures in many Asian countries foregrounds the potential impact of these relationships on competition. It raises concerns about the impact of relative economic power on the competitive process, and this in turn emphasizes related issues of fairness. In the United States and Europe these structures either do not exist or are of marginal concern. Not surprisingly, therefore, the current economics-based model of competition law does not address this form of harm. Similarly, the perceived need to control abuses of economic power by *foreign* corporations is a prominent topic in discussions of competition law in Asia, but the economics-based approach to competition law does not address this

issue. Finally, economic development is a prominent, often the predominant, goal of economic policy in almost all Asian countries (with Hong Kong a possible exception). Again, the economics-based model does not address the issue, at least not directly. To the extent it fails to include development goals it may, therefore, have limited appeal.

Underlying these and other examples is a basic perception in many Asian countries that the protection of domestic producers is at least as important as the desire to benefit consumers. The economics-based model focuses on benefits to consumers, but in Asian countries the desire to benefit consumers cannot easily be divorced from the needs of producers. Regardless of whether the government owns and controls production firms, there is widespread agreement that economic policies should take the needs of producers into account, especially given that producers in the region are acknowledged to face major obstacles in competing with foreign firms. The contexts of competition law in Asia tend, therefore, to emphasize competition law goals that differ significantly from the relatively narrow set of goals pursued in the economics-based model that is the assumed convergence point for global convergence (see also Dowdle, Ch. 1, pp. 25-7). As is explored in greater detail in the final chapter of this volume, this suggests the need for a multi-goal concept of competition law. This is the form in which competition law developed in both the United States and Europe, and it has only recently been abandoned (in the United States) or narrowed (as in the European Union). The factors that have led decision-makers in the United States and Europe to move away from this model may urge Asian countries to move in the same direction, but this has not been established.

This divergence between goals common in Asia, on the one hand, and the economics-based goal structure used by the United States and Europe, on the other, may be a major obstacle in the evolution of convergence as a global competition law strategy. The economics-based model of the goals of competition law was developed in the United States, and it has been adopted to a significant extent by the European Union. It is a response to problems as perceived by decision-makers in the United States and the European Union. To the extent that Asian countries perceive different competition-related issues, convergence as a strategy may have limited appeal. Nevertheless, goals play a symbolic international role as well as a domestic role, and it may provide incentives for Asian countries to announce goals that send desired messages at the international level, regardless of the degree to which the goals are actually pursued by decision-makers on the domestic level.

VII. Response tools: availability and use

Goals matter, but they mean little without implementation. How will goals be achieved? What factors will determine the actual role that competition law norms play in business decision-making? There would be little point in pursuing convergence in goals without considering their implementation and the capacity of competition law to influence business conduct. Notice that I use the term 'implementation' rather than the more common term 'enforcement' in this context. It refers to any measures or policies taken by public authorities or others for the purpose of increasing compliance with competition law norms (see also Maher, Ch. 3, pp. 75–8, for an extended examination of the distinction between enforcement and compliance). We look at two important factors in determining the availability and use of response tools – the characteristics of the legal system itself and the implementation capacity of the institutions related to competition law. Here again the risks of generalization are great, and there is much diversity in Asia on some of these points. Nevertheless, we can identify some basic patterns.

A. *Characteristics of the legal system*

Several characteristics common to legal systems in Asia are particularly relevant for implementing competition law. One central fact is that formal legal institutions in Asia have been imported from 'the West' during the last century or so and sometimes only very recently. As a result, the attitudes and values associated with law as it is known in the United States and Europe tend to be less robust in Asia than they are in their source regions.¹² Most Asian countries have adapted concepts, procedures, and institutions of law from Western countries, but they have been imported into often very well-developed governance institutions with their own traditions, expectations, and preferences (see, e.g., Japan, as described by Vande Walle in Ch. 6). This has led to a process of blending in which formal legal institutions and practices interact with indigenous forms of governance and the expectations associated with them. Not unexpectedly, legal institutions and forms sometimes operate very differently in Asia than they do in their source areas of Europe and the United States.

¹² See, e.g., Harry Scheiber and Laurent Mayali (eds.), *Emerging Concepts of Rights in Japanese Law* (Berkeley, CA: The Robbins Religious and Civil Law Collection, 2007).

In particular, law as a formal and separately identified system of norms and institutions usually operates in Asia within governmental arrangements that feature a high degree of top-down control, on the one hand, and indigenous conflict resolution mechanisms and control structures, on the other. Dense populations and, in many cases, relatively recent histories of disruption and political instability have generated the perception – at least among political elites – that government must exercise strong controls over territory and people. These governance traditions seldom provide 'law' with the status and degree of independence that is often found in 'the West'. This history, and the attitudes and values it has generated, are reflected in many institutions and practices of law that are relevant to competition law implementation. Below are a few examples to illustrate the point. Some of the characteristics mentioned below can also be found in Europe and even the United States, but they tend to be significantly more prevalent and influential in the Asian context.

One example is legal education. In Asian contexts, education in law is often general and designed primarily to train bureaucrats rather than private legal practitioners or judges. In this there are some similarities to other so-called 'civil law' countries, but the focus on training for the bureaucracy and the close association between legal education and success in bureaucracies are particularly pronounced in many Asian countries, especially in countries where Confucian traditions have been emphasized. Moreover, the state frequently controls legal education in ways and to extents that are seldom seen elsewhere. Governments control not only the financing and administrative affairs (this is common in Europe) but often also the content and methods of legal education. The basic image tends to be that government establishes the law by enacting statutes; universities then promulgate these texts; and law students memorize the rules, both substantive and procedural. Memorization of rules tends to be the central feature of the educational mission. There is generally little emphasis on independent analysis, and criticism of the content of laws has generally not been encouraged, although reforms have recently been introduced in both Japan and South Korea to encourage critical legal thinking. This conception of legal education tends naturally to favour modes of governance that centre on control by the state.

Consistent with this role for legal education is the structure of the 'legal profession' (a concept which is itself somewhat strained in application to Asia). In contrast to many Western countries, bureaucrats tend to be at the top of the status hierarchy, with judges and private practitioners lower in status (sometimes far lower). One indication of this pattern is

the fact that in many countries (Japan, China, and South Korea in particular) leading graduates of law faculties typically aspire to become bureaucrats rather than private practitioners or judges.

The roles assigned to law and legal professionals are related to this structure. The basic role for all law-trained individuals is to know what the formal rules are and how they are applied. Statutory texts are at the centre of the legal world. They represent the government – that is, the realm of government officials. Officials typically have strong political and cultural support in interpreting and applying these texts. The role of judges and private practitioners is to use knowledge of the texts to navigate the legal terrain shaped and largely controlled by administrative officials. Creative legal reasoning and argumentation tend to be less valued.

In this context, discretion in applying the rules becomes a central issue. Predictable interpretation of statutory rules is seen as fundamental to the legal system. It is portrayed as reducing the discretion of those who interpret the law (i.e. judges and private practitioners) and at the same time justifying the status and authority of those who write the laws. In many cases in Asia, however, other features of the social and political systems influence outcomes in indirect ways. In China, for example, '*guanxi*' (the systematic use, development, and exchange of personal influence) often plays a significant role in decision-making.

This basic framework provides little support for the competition law model that is the assumed point for global convergence. It tends to support *dirigistic* control of an economy by bureaucratic officials rather than confidence in economic interactions by private firms and individuals. It favours clear rules, and it tends to provide limited space for open-ended norms based on evaluation of economic outcomes.

B. Institutional capacity

Institutional *capacity* available to pursue competition law objectives tends to be limited by these and other aspects of legal and political systems in Asia. Implementation measures must have support in order to be effective. They need economic and human resources as well as intellectual capacities appropriate to the tasks, and they must have sufficient independence from external constraints to pursue those tasks. Again, many Asian competition law institutions lack at least some of the appropriate capacity supports. (See, e.g., Dowdle's exploration of institutional capacity problems in rural China, Ch. 9, pp. 222–5).

Competition law authorities in the region are often new and untried. Their officials are still learning what competition law is about. Often they have had significant administrative experience, but in other areas of law that involve direct economic regulation – such as price controls – that have some similarities to competition law but nevertheless serve quite different purposes with quite distinct tools. Few have had significant practical experience in applying and enforcing competition law. Moreover, in many countries competition law agencies have limited resources that do not provide an adequate base for effective evaluation and application of competition law.

Courts also tend to be deficient in some or all of these respects. In many countries political and economic pressures limit the independence of courts to apply and enforce competition law, while in other countries such as Japan and South Korea judges have well-established judicial independence, but they may be subject to cultural and societal pressures and conventions that tend to impede competition enforcement. Competition law adjudication necessarily requires the capacity to investigate with some care complex factual scenarios, and this has proven to be an obstacle to competition law enforcement not only in Asia, but even in some European countries.

Finally, the specific capacity to use economic tools must be central to any discussion of a convergence strategy that seeks to implement an economics-based model of competition law. In that model, economics determines outcomes. Yet, as we have seen, the capacity of both courts and administrative officials to perform these operations effectively is significantly limited. Competition officials generally do not have significant training in economics, and training in competition law economics is rarer still. This is even more true with regard to judges, who seldom have training of any kind in economics. It is difficult, therefore, to envision convergence around a conception of competition law that requires high levels of capacity in the use and evaluation of economic data and analysis.

C. Implications for global convergence strategy

In general, therefore, the legal and political context in many Asian legal systems provides significant disincentives to adopting a model of competition law based entirely or even primarily on economics. Both the basic characteristics of the legal systems and the specific institutional capacities and capabilities available for competition law implementation tend to

conflict with the basic requirements and assumptions behind the economics-based model of competition law. Even assuming that Asian countries want to accept the procedures and constraints of an economics-based model, they may not possess the tools and resources appropriate for implementing such a model. Moreover, even if the tools were made available, many Asian countries do not generally possess capacities necessary for using them as prescribed in the convergence model.

VIII. Asian culture: phantom or factor?

The issue of culture plays elusive roles in discussions of competition law convergence. As magicians often say, 'Now you see it; now you don't.' On the one hand, there are frequent, almost routine references to the importance of developing 'competition culture', especially in countries with relatively new competition law regimes. The assumption behind these references is that acceptance of the value of economic competition is essential for the effective development of a market economy and that competition law contributes to achieving precisely that end. These references acknowledge that 'values' and 'societal expectations' are not only relevant but central to competition law objectives. On the other hand, few discussions of global competition policy make serious reference to national or other cultural traditions as a factor in assessing the potential for convergence (see also Sum, Ch. 4). 'Culture' in this sense is generally avoided, despite the fact that it refers to exactly the same kinds of factor involved in discussions of 'competition culture' – that is, widely shared values and community expectations. Not only does 'culture' represent a set of issues that can complicate discussions and that many may feel poorly equipped to discuss, but such references also amount to acknowledging obstacles to convergence that some would prefer not to acknowledge. Moreover, the language of economics tends to be rigorously allergic to considerations of culture. An American-style economics-based model is often lauded precisely because it is 'scientific'. This is thought then to have the advantage of avoiding or at least minimizing 'cultural' differences and thereby providing an attractive basis for convergence.

To avoid reference to 'culture' in discussing Asian competition law development is to ignore a major factor in decision-making in these countries. In East Asia, in particular, cultural traditions disfavouring reliance on competition as a social force and favouring reliance on bureaucratic leadership tend to play very important roles. These cultural

traditions influence not only the decisions of leaders and administrators, but also political support for policies such as competition law. Ironically, as explored further by Tony Prosser in Chapter 10, progress in developing a 'competition culture' may require understanding, evaluating, and addressing cultural elements of varying kinds that can both support and impede such development.

IX. Concluding comments

This brief review of the role of Asia in discussions of competition law convergence reveals the risks of assuming that Asian countries will readily and fully accept as their own the economics-based model of competition law that is currently assumed to represent a point of global convergence. The historical experience of Asian countries, their relationships with the global economy, the characteristics of their legal systems, and the political and cultural contexts in which they operate create significant obstacles to deep convergence around such a model.

These factors suggest an evolution in which these countries accept the value of certain elements of such a model of competition law and incorporate some of them, but also develop their own versions of competition law. Perhaps these versions will constitute variations on a theme proposed by the West, but they may also eventually represent a distinctively Asian theme.